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**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

United States of America,  
  
Petitioner,  
  
v.  
  
Eugenii Glushchenko,  
  
Respondent.

No. CV-19-04678-PHX-SPL (JFM)

**MEMORANDUM REGARDING  
INVOLUNTARY FEEDING OF  
IMMIGRATION DETAINEE**

The United States hereby submits this memorandum regarding its interests in continuing to involuntarily feed Respondent, in compliance with this Court's order dated July 16, 2019 (Doc. 8).

**MEMORANDUM**

**I. Status and Background of Respondent's Immigration Proceedings**

Mr. Glushchenko is a native of the Union of Soviet Socialist Republics (USSR) and citizen of Russia, who was born in 1982 in the USSR. Ex. 1. On or about September 2, 2018, Mr. Glushchenko was found near mile marker 77 along State Route 85, near Lukeville, Arizona, after having entered the United States without inspection by an immigration officer by walking through the desert near Sonoyta, Mexico. Exs. 2, 3. On

1 or about September 21, 2018, the Department of Homeland Security (DHS) determined  
2 Mr. Glushchenko to be inadmissible pursuant to § 212(a)(7)(A)(i)(I) of the Immigration  
3 and Nationality Act (INA) as an immigrant not in possession of a valid unexpired  
4 immigrant visa, reentry permit, border crossing card, or other valid entry document  
5 required by the INA. Ex. 4.

6 On October 9, 2018, DHS placed Mr. Glushchenko into removal proceedings under  
7 INA § 240 by issuing him a Notice to Appear (NTA), charging him as removable from the  
8 United States pursuant to INA § 212(a)(6)(A)(i), as an alien present in the United States  
9 without being admitted or paroled, or who arrived in the United States at any time or place  
10 other than as designated by the Attorney General. Ex. 5. On January 18, 2019, an  
11 Immigration Judge at the Eloy Detention Center (EDC) sustained the charge of  
12 removability in the NTA. Exs. 5, 7. On that same date, the Immigration Judge construed  
13 Mr. Glushchenko's appeal to the Board as a request for custody redetermination, but took  
14 no action on the request in order to give Mr. Glushchenko time to gather evidence in  
15 support of his request for a bond and/or to obtain an attorney. Ex. 6.

## 16 **II. Weighing of Interests in Involuntarily Feeding Respondent**

### 17 **A. Regulating Mr. Glushchenko's Hunger Strike by Involuntarily** 18 **Monitoring, Hydrating, and Feeding Him Does Not Violate the First** 19 **Amendment.<sup>1</sup>**

20 "The First Amendment literally forbids the abridgment only of 'speech,'" but the  
21 Supreme Court has "long recognized that its protection does not end at the spoken or

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22 <sup>1</sup> In the order dated July 16, 2019, this Court ordered the United States to explain how its  
23 interests in continuing to involuntarily feed Respondent outweigh vindication of  
24 Respondent's First and Fourteenth Amendment rights. *See* Doc. 8 at 2. The Fourteenth  
25 Amendment prohibits states from depriving any person of life, liberty without due process  
26 of law and from denying to any person within their jurisdictions the equal protection of the  
27 laws. Although the Bill of Rights, including the First Amendment, originally applied only  
28 to the Federal Government, the Supreme Court has now applied many of those rights  
against the states through the Due Process Clause of the Fourteenth Amendment. *See, e.g.,*  
*McDonald v. City of Chicago, Ill.*, 561 U.S. 742 (2010). Because this case does not involve  
state action, but only action by the Federal Government, the Fourteenth Amendment is not  
implicated here. The United States, therefore, will address only the First Amendment  
interests this case may implicate.

1 written word.” *Texas v. Johnson*, 491 U.S. 397, 404 (1989). The Supreme Court has,  
2 however, rejected “the view that an apparently limitless variety of conduct can be labeled  
3 ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.”  
4 *U.S. v. O’Brien*, 391 U.S. 367, 376 (1968).

5 While “a hunger strike may be protected by the First Amendment if it was intended  
6 to convey a particular message,” *Stefanoff v. Hays Cty., Tex.*, 154 F.3d 523, 527 (5th Cir.  
7 1998), in deciding whether particular conduct possesses sufficient communicative  
8 elements to bring the First Amendment into play, the Supreme Court has “asked whether  
9 an intent to convey a particularized message was present, and whether the likelihood was  
10 great that the message would be understood by those who viewed it.” *Johnson*, 491 U.S.  
11 at 404 (internal quotation and punctuation marks, and citation, omitted).

12 In contrast to many of the cases in which the Supreme Court has recognized the  
13 expressive nature of conduct under the First Amendment, Mr. Glushchenko’s hunger strike  
14 does not appear to be intended to convey any particular message. *See Tinker v. Des Moines*  
15 *Indep. Cmty. School Dist.*, 393 U.S. 503, 505 (1969) (recognizing the expressive nature of  
16 students’ wearing of black armbands to protest American military involvement in  
17 Vietnam); *Brown v. Louisiana*, 383 U.S. 131, 141-42 (1966) (recognizing the expressive  
18 conduct of a sit-in by blacks in a “whites only” area to protest segregation); *Schacht v.*  
19 *United States*, 398 U.S. 58 (recognizing as expressive conduct the wearing of American  
20 military uniforms in a dramatic presentation criticizing American involvement in  
21 Vietnam); *Spence v. Washington*, 418 U.S. 405, 409-10 (finding that attaching a peace sign  
22 to the flag is expressive conduct); and *West Virginia Bd. of Educ. v. Barnette*, 319 U.S.  
23 624, 632 (1943) (recognizing that a refusal to salute the flag was expressive conduct).  
24 Instead, Mr. Glushchenko has alternatively told Enforcement and Removal Operations  
25 officials that “he was not eating because he was not hungry, or that he will not eat until he  
26 is released from detention.” Decl. of Jason Ciliberti at ¶ 7 (Doc. 1-3). Thus, unlike the  
27 long line of cases in which the Supreme has found conduct to be expressive and, therefore,  
28 constitutionally protected, no intent to convey a particularized message is evident in Mr.

1 Glushchenko's hunger strike. Moreover, even if there was some intent to convey a  
2 particularized message, there is no great likelihood that the message would be understood  
3 by those who viewed it. *See Johnson*, 491 U.S. at 404. For these reasons, Mr.  
4 Glushchenko's hunger strike does not constitute expressive conduct protected by the First  
5 Amendment.

6 Although it appears Mr. Glushchenko's hunger strike is not intended to convey any  
7 particular message, his conduct clearly involves the "nonspeech" element of refusing to  
8 take in hydration or nourishment. Even assuming for the sake of argument that his hunger  
9 strike is intended to convey a particular message, the Supreme Court has held that "when  
10 'speech' and 'nonspeech' elements are combined in the same course of conduct, a  
11 sufficiently important governmental interest in regulating the nonspeech element can  
12 justify incidental limitations on First Amendment Freedoms." *O'Brien*, 391 U.S. at 376.  
13 "[A] government regulation is sufficiently justified if it furthers an important or substantial  
14 government interest; if the governmental interest is unrelated to the suppression of free  
15 expression; and if the incidental restriction on alleged First Amendment freedoms is no  
16 greater than essential to the furtherance of that interest." *Id.* at 377.

17 Here, the regulation of Mr. Glushchenko's hunger strike by involuntarily  
18 monitoring, hydrating, and feeding him is sufficiently justified because it furthers the  
19 important and substantial interest of preserving the health and life of an immigration  
20 detainee, Mr. Glushchenko. Doc. 1-3, Ciliberti Decl. at ¶¶ 17(a), 17(i). Furthermore,  
21 preserving Mr. Glushchenko's health and life by involuntarily monitoring, hydrating, and  
22 feeding him maintains the security and discipline of the Eloy Detention Center (EDC). *Id.*  
23 at ¶¶ 17(a), 17(c), 17(d)-(f). Moreover, not only are these governmental interests unrelated  
24 to the suppression of free speech, but any incidental restriction they may impose on free  
25 speech is no greater than essential to further these important interests. Thus, the  
26 governmental interests in regulating the nonspeech element of Mr. Glushchenko's hunger  
27 strike fully justify any incidental limitations on his First Amendment Freedoms. *See*  
28 *O'Brien*, 391 U.S. at 376.

1           **B.     Involuntarily Feeding Mr. Glushchenko Based on a Medical Emergency**  
2           **Does Not Violate His Constitutional Rights.**

3           The majority of courts to have considered the question of force-feeding, even in  
4 cases where detainees were not involved in criminal conduct, have held that an order  
5 authorizing force-feeding based on a medical emergency does not violate a hunger-striking  
6 prisoner's constitutional rights. *Grand Jury Subpoena John Doe v. United States*, 150 F.3d  
7 170, 171-72 (2nd Cir. 1998). In addition, "the overwhelming majority of courts have  
8 concluded ... that absent exceptional circumstances prison officials may force-feed a  
9 starving inmate actually facing the risk of death." *Aamer v. Obama*, 742 F.3d 1023, 1041  
10 (D.C. Cir. 2014). Moreover, "[t]he mere allegation of force-feeding does not describe a  
11 constitutional violation." *Martinez v. Turner*, 977 F.2d 421, 423 (8th Cir. 1992).

12           In *Aamer*, 742 F.3d at 1026-27, 1043, three nonresident-alien detainees who,  
13 remained in custody despite having been cleared for release, brought suit in connection  
14 with their non-court-ordered force-feeding, or threat of force-feeding, while detained at the  
15 Guantanamo Bay Naval Station. They claimed "that the government's force-feeding of  
16 hunger-striking detainees violate[d] their constitutionally protected liberty interest—  
17 specifically, the right to be free from unwanted medical treatment...." *Id.* at 1038. The  
18 court assumed, without deciding, that the constitutional right to be free from unwanted  
19 medical treatment extends to nonresident aliens detained at Guantanamo and that it should  
20 use the *Turner* framework to evaluate the petitioners' claims. *Id.* at 1039.

21           "In *Turner*, the Supreme Court set forth the general test for assessing the legality of  
22 a prison regulation that 'impinges on' an inmate's constitutional rights, holding that such  
23 a regulation is 'valid if it is reasonably related to legitimate penological interests.'" *Id.* at  
24 1039 (quoting *Turner v. Safley*, 482 U.S. 78, 89 (1987)). "The very premise of *Turner* is  
25 that a prison regulation that impinges on inmates' constitutional rights may nonetheless be  
26 valid." *Id.* (internal quotation marks and citation omitted). In other words, "although  
27 prison walls do not form a barrier separating prison inmates from the protections of the  
28 Constitution, they do substantially change the nature and scope of those constitutional

1 protections, as well as the degree of scrutiny that courts will employ in assessing alleged  
2 violations.” *Id.* (Internal quotation marks and citation omitted).

3 In *Aamer*, the government identified two penological interests at stake, “preserving  
4 the lives of those in its custody and maintaining the security and discipline in the detention  
5 facility.” *Id.* at 1040. The D.C. Circuit acknowledged that “many courts have concluded  
6 that such interests are legitimate and justify prison officials’ force-feeding of hunger-  
7 striking inmates.” *Id.* (discussing numerous cases in which courts have found preservation  
8 of life of those in custody and maintaining security and discipline in the detention facility  
9 legitimate interests that justify force-feeding).

10 The Department of Homeland Security (DHS), U.S Immigration and Customs  
11 Enforcement (ICE), has expressed penological interests in this case that are nearly identical  
12 to the interests expressed in *Aamer*. First, and foremost, ICE is obligated to maintain the  
13 safety and security of the ICE detainees housed at the EDC and provide for the health and  
14 well-being of the detainees. Doc. 1-3, Ciliberti Decl. at ¶ 17(a). Included in that obligation  
15 is the responsibility to ensure appropriate medical care to detainees and to act to preserve  
16 and protect detainees’ lives while they are detained at the EDC. *Id.* at ¶ 17(i). Allowing a  
17 detainee to cause his own death without staff intervention would completely undermine  
18 DHS’s obligation to render appropriate medical care and prevent detainee suicides. *Id.* at  
19 ¶ 17(c).

20 If other detainees were to become aware of a hunger-striker’s death due to inaction  
21 by EDC staff, those detainees may lose confidence in the skills, abilities, or willingness of  
22 EDC staff to administer medical care. *Id.* at ¶ 17(d). Those detainees may become  
23 reluctant to seek treatment from EDC medical staff, reluctant to accept recommended  
24 treatments, and may decide there is a need to second-guess the judgments of medical  
25 staff. *Id.* They may simply refrain from seeking treatment for their illnesses, leading to  
26 emergency situations that could have been avoided had the detainee sought medical help  
27 at an earlier time. *Id.*

28 If ICE were simply to allow Mr. Glushchenko to die, without intervening to save

1 him, it is quite possible that security and discipline at the EDC could be adversely affected.  
2 Other EDC detainees could act alone or in groups to disrupt operation of the EDC by  
3 engaging in hunger strikes or in other disruptive or violent acts directed at staff to express  
4 detainee anger, resentment, and frustration. *Id.* at ¶ 17(a). Other detainees may also engage  
5 in hunger strikes to attempt to manipulate staff to gain various benefits and privileges. *Id.*  
6 at ¶ 17(f). Without the ability to intervene when medically necessary, the EDC will be  
7 forced to choose between letting a detainee die or giving in to his wishes. *Id.*

8 As noted in the United States' Status Report (Doc. 7), on July 12, 2019, medical  
9 personnel determined that it was necessary to involuntarily feed Mr. Glushchenko, but he  
10 was able to dislodge the nasogastric tube on both attempts. Since then, Mr. Glushchenko  
11 has largely voluntarily consumed the nutritional supplement after much coaxing by medical  
12 staff, but on two occasions, Mr. Glushchenko refused to voluntarily consume the  
13 supplement, relenting only after the security team was assembled to place the nasogastric  
14 tube. Doc. 7-1, Decl. of Dale Welsch, PA-C at ¶¶ 8, 9. Mr. Glushchenko continues to  
15 refuse to be weighed, is unable to walk, and is severely emaciated. Ex. 8, Decl. of Dale  
16 Welsh, PA-C, dated July 18, 2019, at ¶ 10. His lab work remains abnormal.

### 17 **III. Conclusion**

18 The regulation of Mr. Glushchenko's hunger strike by involuntarily feeding him is  
19 valid because it is reasonably related to the penological interests at stake here, namely, the  
20 preservation of Mr. Glushchenko's health and life, and the maintenance of security and  
21 discipline at the EDC. Even if involuntarily feeding Mr. Glushchenko impinges upon his  
22 constitutional rights, which DHS does not concede, DHS's interests in preserving Mr.  
23 Glushchenko's health and life and in maintaining security and discipline at the EDC justify  
24 regulating Mr. Glushchenko's hunger strike by involuntary feeding him as medically  
25 necessary.

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1 Respectfully submitted the 18th day of July, 2019.

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